

ISSUE I

Is a judge required, after a contested election, to recuse himself or herself from contested matters involving a former campaign manager?

ANSWER

Yes, for a reasonable period of time.

ISSUE II

Is a judge required, after a contested election, to recuse himself or herself from contested matters involving former campaign opponents or supporters?

ANSWER

No, with cautions.

FACTS

An associate at the judge's then law firm served as the judge's campaign manager in a contested election. After the primary election, two of the judge's former opponents became supporters, one allowing his name to be used in campaign materials, and the other participating in a public endorsement for the judge. Subsequent to the judge's successful election bid, the law firm of which the judge and the associate/campaign manager were members was dissolved. Both the former associate and the attorney supporters are likely to appear before the judge on contested matters.

DISCUSSION

Issue I: Is a judge required, after a contested election, to recuse himself or herself from contested matters involving a former campaign manager?

The Committee concludes that the issue presented involves the provisions of SCR 60.03(1), 60.04(4), and 60.04(6).

SCR 60.03 A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

A. SCR 60.03(1) states:

A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

SCR 60.04 A judge shall perform the duties of judicial office impartially and diligently.

B. SCR 60.04(4) states:

Except as provided in sub. (6) for waiver, a judge shall recuse himself or herself in a proceeding when the facts and circumstances the judge knows or reasonably should know establish one of the following or when reasonable, well-informed persons knowledgeable about judicial ethics standards and the justice system and aware of the facts and circumstances the judge knows or reasonably should know would reasonably question the judge's ability to be impartial....

C. SCR 60.04(6) states:

A judge required to recuse himself or herself under sub. (4) may disclose on the record the basis of the judge's recusal and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive recusal. If, following disclosure of any basis for recusal other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be required to recuse himself or herself and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

SCR 60.03(1) sets the standards for dealing with the public's perception of the integrity and impartiality of the judiciary. As is pointed out in the comments section to SCR60.03(1):

The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.

These appearances are viewed from the perspective of the public, which expects a high standard of conduct on the part of judges. A judge must be careful that the judge's behavior, on or off the bench, does not undermine public confidence in the integrity and impartiality of the judiciary.

A former campaign manager has a sufficient, formalized association to raise legitimate questions of impartiality in the mind of the public and attorneys appearing before the judge.

SCR 60.04(4) also looks to an objective test of impartiality, this time not of the public, but rather of a reasonable person within the judicial system. With the understanding that it is not actual bias at issue but the appearance of bias, a knowledgeable person within the judicial system could question the judge's ability to be impartial in a situation where the judge's former campaign manager appeared before the court in a contested matter.

The appearance of impropriety of the campaign manager relationship will, in most cases, dissipate over time. Recusal is only required for a reasonable period of time after the cessation of the campaign manager relationship. The length of time will vary and must be examined, and determined, on a case-by-case basis. In the present case, where the campaign manager was a former associate of the judge, the election was contested, and the campaign manager was, apparently, actively involved in the campaign process, a reasonable period of time for required recusal would be at least one year. Factors that the judge must take into consideration in this regard include, but are not necessarily limited to:

- a) the appearance to the general public of the failure to recuse;
- b) the degree of involvement between the judge and campaign manager;
- c) the closeness of the financial, professional, personal, or other interests between the campaign manager and the judge;
- d) the appearance to other attorneys, judges, and members of the legal system of the failure to recuse;
- e) the administrative burden of the recusal on the courts.

The judge should also be cognizant of the continuing mandates of SCR 60.04(4). Even after the passage of a reasonable period of time, as described above, if the judge is aware, or perceives, that the judge's relationship with the campaign manager continues to be of such a close nature that a knowledgeable person might reasonably question the judge's ability to be impartial, recusal might still be required.

If recusal is required prior to the passage of a reasonable period of time, or may be required due to the actual or perceived nature and/or extent of the relationship, the judge is reminded of the provisions of SCR 60.04(6). A judge, having been required to recuse herself or himself, may, if appropriate, seek the waiver of that recusal through a full disclosure to, and acquiescence of, the participants in the proceedings.

Issue II: Is a judge required, after a contested election, to recuse himself or herself from contested matters involving former campaign opponents or supporters?

The Committee concludes that the issue presented involves the provisions of SCR 60.03(1) and 60.04(4).

SCR 60.03 A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

A. SCR 60.03(1) states:

A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

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B. SCR 60.04(4) states:

Except as provided in sub. (6) for waiver, a judge shall recuse himself or herself in a proceeding when the facts and circumstances the judge knows or reasonably should know establish one of the following or when reasonable, well-informed persons knowledgeable about judicial ethics standards and the justice system and aware of the facts and circumstances the judge knows or reasonably should know would reasonably question the judge's ability to be impartial....

Unlike the situation involving the former campaign manager, the mere fact of prior support for, or opposition to, a judge's election does not necessarily rise to the level of an appearance of impropriety. Both the public, and knowledgeable persons within the judicial system, are fully aware of, and likely comfortable with, the fact that people will support an individual for judicial office with various levels of assistance, monetary support, or endorsements. This fact, in and of itself, does not create so close or special a relationship so as to require automatic recusal.

The nature and involvement of support, however, can rise to such a level so as to require recusal. The judge must always be conscious of the provisions of SCR 60.04(4) and alert to any situations where the judge's knowledge of particular facts, circumstances, or personal/professional relationships would reasonably call the judge's impartiality into question. In this analysis, the judge should take into consideration those same factors set forth in Issue I, above. If the judge is aware of such facts or circumstances, the judge should, of course, recuse himself or herself from the specific proceeding.

CONCLUSION

The Committee concludes that a judge must, for a reasonable period of time after the cessation of the relationship, recuse himself or herself in all contested matters involving a former campaign manager. Recusal is not, however, necessarily required in matters involving former opponents or supporters who endorsed or opposed the judge's election.

APPLICABILITY

This opinion is advisory only, is based on the specific facts and questions submitted by the petitioner to the Judicial Conduct Advisory Committee, and is limited to questions arising under the Supreme Court Rules, Chapter 60 – Code of Judicial Conduct. This opinion is not binding upon the Wisconsin Judicial Commission or the Supreme Court in the exercise of their judicial disciplinary responsibilities. This opinion does not purport to address provisions of the Code of Ethics for Public Officials and Employees, subchapter III of Ch. 19 of the statutes.

I hereby certify that this is Formal Opinion No. 03-1 issued by the Judicial Conduct Advisory Committee for the State of Wisconsin this 22nd day of March, 2004.

Honorable George S. Curry
Chair